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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 368

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, ET AL., *Petitioners*

v.

ALBERTA SCHERMERHORN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

NO. 404

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GENERAL MOTORS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, hereby respectfully move for leave to file a joint brief as *amici curiae* in support of petitioners in No. 368 and in support of petitioner in No. 404, as provided for in Rule 42 of the Rules

of this Court. The consent of the attorneys for the petitioners in No. 368 has been obtained. The consent of the Solicitor General has been obtained in behalf of the petitioner in No. 404. The consent of the attorneys for the respondents in No. 368 and No. 404 was requested but refused.*

The AFL-CIO is primarily a federation of national and international labor organizations having a total membership of approximately thirteen million. The local union which is a petitioner in No. 368 is affiliated with one of the international labor organizations in the Federation. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, also an affiliate of the Federation, filed the unfair labor practice charges involved in No. 404. No. 368 presents the question whether collective agreements requiring nonunion employees to pay service fees to their bargaining representatives are subject to prohibition by the states. No. 404 presents the question whether collective agreements requiring employees to become union members or to pay the equivalent of union fees and dues are valid as a matter of federal law. The issues are thus distinct but interrelated. Both are of the utmost significance for the American labor movement. The AFL-CIO, as the principal spokesman for the organized workers of this country, and the UAW with its special interest as the charging party in one of the cases, desire the opportunity to present their views on these issues to the Court.

Petitioners in the two cases, whose positions the AFL-CIO and the UAW are supporting, will naturally concentrate on the individual question presented by their own particular case. For American labor, however, it will be of little lasting value if only one of the judgments below is

* The pertinent correspondence has been submitted to the Clerk of the Court.

reversed. We therefore think it vital that a single brief be placed before this Court treating both cases together and showing that the proposed contractual arrangement at issue in No. 404 is valid under federal law, that the executed agreement at issue in No. 368 is beyond the reach of prohibitory state law, and that those two propositions are supported by the congressional purpose in enacting the relevant provisions of Taft-Hartley and by the demonstrated needs of sound national labor policy. Tendered with this motion is a brief following that approach. We feel our presentation should assist the Court in viewing the questions posed by the two cases with a greater awareness of their interrelationship and of their importance to American labor.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AS AMICI CURIAE

INTEREST OF AMICI CURIAE

This joint brief *amici curiae* is tendered for filing by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and by the International Union,

United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, contingent upon the Court's granting the Motion for Leave to File a Brief as Amici Curiae.

The AFL-CIO, a federation of national and international unions having approximately thirteen million members, is the principal spokesman for organized working people in this country. The UAW filed the unfair labor practice charges involved in No. 404. That case presents the question whether collective bargaining agreements requiring employees to become union members or to pay the equivalent of union fees and dues are valid as a matter of federal law. No. 368 presents the question whether collective agreements requiring nonunion employees to pay service fees to their collective bargaining representative are subject to prohibition by the states.

These questions, which are of the utmost concern to American labor, are logically distinct but they should be considered together. Petitioners in the two cases at bar will naturally concentrate on the issues in their own particular case. There is need for a single brief treating the issues of both cases in light of their interrelationship, and demonstrating that the proposed agreement at issue in No. 404 is valid as a matter of federal law, and that the executed agreement at issue in No. 368 is not subject to state control. The AFL-CIO, speaking for the main body of the labor movement, and the UAW, the charging party in one of the cases, are thus vitally interested in the validity of contractual arrangements which have become a practical necessity if unions throughout the country are to be assured of the means of fulfilling their federal statutory responsibility of fair representation.

SUMMARY OF ARGUMENT

I

The permission contained in section 8(a)(3) of the National Labor Relations Act for union shop agreements includes permission for agency shop agreements, because any other conclusion makes a mockery of common sense. Agreements requiring employees to become union members are expressly lawful under the statute. It would be a tortured construction to say that agreements nevertheless are unlawful when they give employees the option either to become union members *or* to pay fees equal to members' fees and dues. The addition of the extra option cannot make invalid an otherwise valid provision.

This is especially so since other contractual arrangements not requiring membership absolutely, such as maintenance of membership agreements, are permitted by the Act. Furthermore, under existing precedents even a union shop clause cannot be enforced through the discharge of an employee who tenders fees and dues but refuses to become a member. The agency shop has served as a compromise solution in numerous union security disputes and should be preserved.

II

Section 14(b) of the Act gives the states the power to forbid agreements requiring union "membership." This does not include the power to forbid an agreement which gives employees the option of meeting the contract's requirements by paying fees instead of by becoming union members. Such a conclusion is not just in accord with the language of the statute; it is in accord with the intent of Congress.

In dealing with the problem of "compulsory unionism" in the Taft-Hartley Act in 1947, Congress was not con-

cerned about the payment of nondiscriminatory, nonexcessive fees to labor organizations. It was concerned about abuses associated with union *membership* requirements—about the exclusion of employees from jobs because they were arbitrarily denied admission to membership and about the removal of employees from jobs because they were arbitrarily expelled from membership. The solution of Congress was to regulate the requirement of *membership* as a matter of federal law, and to leave the question of further regulation or outright prohibition of the requirement of *membership* in the hands of the states. Neither the vice nor the cure was seen in terms of fee payments divorced from compulsory membership.

Allowing the states to regulate more than the requirement of membership would invite further encroachments on federal labor policy through state regulation or prohibition, already beginning, of the exclusive hiring hall or even of the status of a majority union as exclusive bargaining representative. State regulation must be limited to the one area allowed by section 14(b)—agreements requiring "membership."

III

Even if this Court should eventually decide that the states under section 14(b) may properly prohibit agreements requiring nonunion employees to pay fees equal to members' fees and dues, on the ground that such agreements are *in fact* equivalent to agreements requiring membership, this question is not now before the Court in *Retail Clerks Local 1625* v. *Schermerhorn*, No. 368. For the agreement at issue here, by its terms, requires of nonunion employees only the payment of a service fee to help defray the union's collective bargaining costs.

Such a fee, if fairly apportioned, does not amount to an

encouragement of union membership, because it merely represents the pro rata cost of the benefits received by an employee as a result of the union's services. It is precisely in accord with the expressed congressional purpose of eliminating "free riders." It completely lacks any element of compulsion on dissenters to associate with an organization against their will. It partakes in no way of union "membership." It is a practical necessity if a union is to fulfill its obligation under the statute to represent fairly all the employees in the bargaining unit. The validity of such a service fee, like the validity of a reasonably apportioned registration fee charged nonunion applicants using a union's exclusive hiring hall, or like the validity of any similar fee, should be entirely a matter for initial decision by the NLRB applying uniform national law and policy, and not a matter for the states applying their own individual and differing laws and policies.

ARGUMENT

I. The Permission In Section 8(a)(3) Of The National Labor Relations Act For Agreements Requiring Union Membership Includes Permission For Agreements Requiring Either Union Membership Or The Alternative Option Of Fees Payments.

A. The Common Sense of the Statute

It is axiomatic in interpreting statutes that a "literal reading of them which would lead to absurd results is to be avoided.". Stone, J., speaking for the Court in *Haggar Company* v. *Helvering*, 308 U.S. 389, 394. The first proviso to section 8(a)(3) of the National Labor Relations Act, 61 Stat. 140 (1947), as amended, 29 U.S.C. §158(a)(3), expressly permits an employer to make an agreement with a labor organization "to require as a condition of employment membership therein on or after the thirtieth day following

the beginning of such employment or the effective date of such agreement, whichever is the later * * *." *NLRB* v. *General Motors Corp.*, No. 404, presents the question whether that permission includes permission for an agreement requiring as a condition of employment on or after the thirtieth day *either* union membership *or*, at the employee's own option, the payment of fees and dues equal to the regular union fees and dues.

Only an artificially literal reading of the statute could hold that its permission does not extend to an agreement which imposes the precise requirement allowed by the statute, simply because the agreement adds that an employee has the choice of paying fees and dues as an alternative to joining the union. For us the test is a simple one: section 8(a)(3) at the very least protects an agreement which by its terms makes plain to an employee that he can comply with its requirements by doing *exactly* what section 8(a)(3) allows an employer and a union to require of employees. If that test is met, it becomes irrelevant, viewed purely as a matter of federal labor law, whether the employee is given the option of complying with the agreement's requirements by doing something else.[1]

B. Legislative Intent

An agreement giving the optional requirement of membership or equivalent payments falls within the plain intendment of the statutory language. For section 8(a)(3) does no more than set the outer limit of what a collective bargaining agreement may provide in the way of union security.

Indeed, it will hardly be denied that section 8(a)(3) does permit something less in the way of union security than requiring membership by all employees on or after the

[1] We assume that the alternative option involves no conduct itself unlawful, which might cause problems not here present.

thirtieth day. No one is likely to contend, for example, that the General Motors Corporation and the Ford Motor Company are violating the law by incorporating in their standard union contracts provisions requiring union membership "within ten days" after the thirtieth day.[2] Nor would it be suggested that there is an infirmity in the "maintenance-of-membership" clauses which are included in some five percent of the collective bargaining contracts throughout the country.[3] See *Krause Milling Co.*, 97 NLRB 536 (1951). Yet such clauses do not require union membership as a general condition of employment, but simply require that union membership be maintained by those employees who belong to the union when the contract is executed or who voluntarily join it thereafter.

Since a collective bargaining agreement may thus provide something less than a requirement of membership on or after the thirtieth day for all employees covered by an agreement, it follows inexorably that section 8(a)(3) only provides an outer limit of union security and not the sole form of union security permissible. The agency shop—omitting as it does from the requirement of membership those who choose to make equivalent support money payments—falls squarely within that perimeter.

The court below hardly addressed itself to this problem. In holding the agency shop invalid under section 8(a)(3), it simply pronounced its *ipse dixit* that an agency shop arrangement is "different" from a union shop and not something "lesser" (R. 114). But whether one calls the agency shop lesser or different from a union shop, the simple fact is that the agency shop does provide *greater choice* to the

[2] See 1 CCH Union Contracts—Arbitration ¶¶ 59,905.04, 59,923.006.

[3] See 46 LRRM 14, 18 (1961) (based on a survey by the Bureau of National Affairs of 400 representative contracts in effect as of mid-1960).

employee than does the union shop—it gives him the option of being a union member or not being a member, which the union shop does not. Since Congress deemed the union shop a permissible restriction on the employee's freedom of choice, there could be no conceivable reason for striking down an arrangement which gives the employee the additional choice of making equivalent payments without joining the union.

To interpret the Act as permitting the union shop and prohibiting the agency shop is "to infer Congressional idiosyncrasy." *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 393. And in this instance, it is all the more far-fetched to infer congressional idiosyncrasy because the legislative history of the Act is clear that lesser forms of union security, including the agency shop, were intended to be permissible under section 8(a)(3).

With respect to both the Wagner and Taft-Hartley Acts, Congress evidenced an intent that the union security provision merely mark the outer limit of the permissible; and in the case of the Taft-Hartley Act Congress explicitly intended to permit the agency shop. The Senate Committee Report on the Wagner Act expressly states that "the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal; it does not interfere with the *status quo* on this debatable subject but *leaves the way open to such agreements as might now legally be consummated* * * *." S. Rep. No. 573, 74th Cong., 1st Sess., pp. 11-12 (1935). (Emphasis added.) In the case of the Taft-Hartley Act, Senator Taft himself, in explaining section 8(a)(3), referred to the agency shop which had developed in Canada, under which, as Senator Taft put it, "If he pays the dues without joining the union, he has the right to be employed." 93 Daily Cong. Rec. 5088 (May 9, 1947), 2 Legislative History of the Labor Manage-

ment Relations Act [hereinafter cited "Leg. Hist."] 1422. And, as also stated by Senator Taft during the debate: "• • • what we do, in effect, is to say that no one can get a free ride in such a shop. • • • The employee has to pay the union dues." 93 Daily Cong. Rec. 3953 (April 23, 1947), 2 Leg. Hist. 1010. This Court summed up the legislative history in *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 41: "Thus Congress recognized the validity of unions' concern about 'free riders' • • •." The failure of the court below to take note of that congressional concern with "free riders" led it to its irrational conclusion.

C. The Structure and Operation of §8(a)(3)

The decision below is even more incompatible with the overall scheme of section 8(a)(3) than it is with the language validating the union shop. For, while the first proviso to section 8(a)(3) permits employers and unions to enter into union shop agreements, under existing Labor Board precedents the second proviso of section 8(a)(3) does not permit enforcement of such union shop agreements by discharge of nonmember employees who tender dues and initiation fees. In other words, while section 8(a)(3) permits a union shop clause to be written into a collective bargaining agreement, as currently interpreted it only permits the discharge of those who do not pay dues and initiation fees, which from the standpoint of enforcement amounts to the same thing as an agency shop. The decision of the court below thus accomplishes the incongruous result that a clause providing for a union shop which presently may be enforced by discharge only as an agency shop is legal, but a clause providing for an agency shop is illegal.

The actual operation of section 8(a)(3) is illustrated by the decisions of the NLRB in *Union Starch and Refining Co.*, 87 NLRB 779 (1949), *enforced* 186 F.2d 1008 (7th Cir. 1951), *cert. den.* 342 U.S. 815, and *Marlin Rockwell Corp,*

114 NLRB 553 (1955). In *Union Starch* the Board, basing its decision on part (B) of the second proviso to section 8(a)(3), found both the union and the employer guilty of unfair labor practices, on the ground that discharged employees had been denied union membership for reasons other than failure to tender dues and initiation fees, i.e., for refusing to take the union oath. In *Marlin Rockwell* the Board held it an unfair labor practice for a union to invoke a maintenance of membership clause against employees who, while they continued to pay dues, had voluntarily resigned their union membership. The Board, following the reasoning of *Union Starch*, concluded that membership terminated by voluntary resignation was, in the language of clause (B) of section 8(a)(3), "membership * * * terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees," and, therefore, not a permissible ground for discharge.

We have serious reservations about the rationale of these decisions, and about the result in *Marlin Rockwell* especially. Regardless of this, however, it is clear that a union shop clause may be enforced by way of job sanctions as if it were an agency shop clause, and under existing precedents may only be so enforced.

The court below did not discuss these decisions, or any other decisions, or the effect of the second proviso to section 8(a)(3). In its cursory denial of the Board's request for enforcement the court simply noted that section 8(a)(3) speaks in terms of "membership" "as a condition of employment" and declared that the "agency shop arrangement" is not the same thing. The court ignored the fact that while the first proviso to section 8(a)(3) speaks in union shop terms, i.e., "membership" "as a condition of employment," the second proviso, and particularly part (B) thereof, imposes additional restrictions on the imple-

mentation of the union shop which may equate the type of union security arrangement enforceable under the statute to an agency shop.

Thus it is anomalous to hold, as did the court below, that an outright agency shop provision is illegal. It can hardly be the law that to be valid a union security provision must first provide for a union shop, using the language of the first proviso to section 8(a)(3), and then limit it to, in effect, an agency shop, by incorporating the restrictions of the second proviso. The Act does not set forth a model union security clause for incorporation in contracts, and say that only it shall be valid, nor does it confer on the Board, or the court below, any power to devise and require the use of such a model provision. *Teamsters Local 357* v. *NLRB*, 365 U.S. 667, 676-677.

The court below apparently also failed to comprehend the distinction between a union security provision under which employees are given the option of joining the union or paying the equivalent of initiation fee and dues while remaining outside of the union, and a provision which accords no option of joining. The court's opinion leaves the impression that the union was seeking an arrangement of the latter type.[4] But the decision of the Board unequivocally declares:

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[4] The court's opinion states: "The Union made a demand in writing that the employer bargain with respect to its proposal that the existing National Agreement between the parties be supplemented so as to require as a condition of continued employment that all employees not already members of the Union, and new employees hired thereafter at the employer's Indiana locations must pay to the Union within thirty days after the agreement or of their initial employment, whichever is later, a sum equal to the initiation fee charged members of each of Union's locals and monthly sums equal to the regular membership dues required of its locals' members at each location. This type of arrangement is called an 'agency shop'" (R.111).

> "Second, there is no suggestion made anywhere in this proceeding that membership in the Union is not available to any nonmember employee who wishes to join. Everyone concedes that the Union was not seeking to bargain over a clause requiring nonmember employees to pay sums equal to dues and fees as a condition of employment while at the same time maintaining a closed-union policy with respect to applicants for membership" (R. 60).

The distinction, at best ignored by the court below, may well be crucial, for it would appear, and the union has never urged otherwise, that a provision requiring the payment of initiation fees and dues without an option of joining the union would indeed be invalid, since membership would not be available "on the same terms and conditions" applicable to others, as called for by the second proviso to section 8(a)(3). But where, as here, membership is available to all on equal terms, the option of nonmembership can hardly result in invalidity.

D. Public Policy

Prior to its decision in the instant case, the NLRB upheld the legality of the agency shop in *Public Service Company of Colorado*, 89 NLRB 418 (1950), decided under the Wagner Act, and in *American Seating Company*, 98 NLRB 800 (1952), decided under the Taft-Hartley Act. Relying upon these decisions, the Federal Mediation and Conciliation Service has distributed a report on the agency shop for the use of its staff which not only sets forth various forms of agency shop clauses, but asserts the legality of these clauses.[8]

In the years since these decisions agency shop clauses have been included in numerous collective bargaining agreements. A survey by the Bureau of National Affairs

[8] See Federal Mediation Service, *The Agency Shop* 25 (1959).

of 400 representative union contracts in effect as of mid-1960 disclosed that "[a]gency-shop clauses are now included in 6 percent of contracts, up from 1 percent in 1957."[6]

Despite certain limitations, the agency shop has served over the years as a useful compromise solution for disputes over union security. Employers who have taken the position that they were unwilling, as a matter of principle, to enter into an agreement requiring employees to join a union which they might object to joining, have sometimes been willing to compromise upon an agency shop, which requires employees to contribute to the financial support of the union, but gives them the option whether to join. A recent compromise settlement of this sort is the agreement entered into in July 1962 between Douglas Aircraft Company, the United Automobile Workers, and the International Association of Machinists. The aircraft manufacturers had over the years resisted any sort of union security arrangement, but as part of the July settlement Douglas Aircraft agreed to an agency shop.[7]

The agency shop compromise has sometimes, according to *Fortune Magazine*, even served the interests of management. *Fortune* states:

> "In some cases the agency shop served a special management purpose. For several years before 1952, Western Union had a union-shop provision in its contracts covering 30,000 employees. In that year there was a bitter strike during which some union members crossed the picket line and returned to work. Fearing that these people would be expelled from the union as a result and therefore lose their jobs, Western Union refused to accede again to the union shop and compromised instead on an agency shop."[8]

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[6] 46 LRRM 14, 18 (1961).

[7] *N. Y. Times*, July 17, 1962, p. 1, col. 1.

[8] "The Agency Shop," *Fortune Magazine*, January 1961, p. 176.

The agency shop has also sometimes been used by unions to meet the objections of persons who refuse on religious grounds to join unions, and here too the compromise role of the agency shop has been constructive.* Plainly, it serves no useful purpose to require, as does the decision below, that unions must either (1) agree that religious objectors actually join the union, on pain of discharge for refusal, or (2) forego agreeing that religious objectors pay their share of the unions' costs.

Only the clearest statutory language and legislative history would justify (1) overruling the long-standing Board decisions upholding the agency shop under both the Wagner and Taft-Hartley Acts, (2) invalidating the large number of existing agency shop agreements, and (3) depriving both management and labor of this compromise solution to disputes over union security. Far from there being any such language and history, every indication of congressional intent supports the validity of the agency shop as a reasonable means of resolving labor-management conflicts in this area.

Sensible solutions to the union security issue are difficult enough to arrive at without outlawing one—the agency shop—that has already proven its value. The kind of agreement proposed by the union in *General Motors* should therefore be sustained under federal law. It remains for us to show that the kind of agreement at issue in *Retail Clerks Local 1625* v. *Schermerhorn*, No. 368, is beyond the power of a state to prohibit.

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* *E.g.*, the contract between Local 135, UAW, and American Seating Company, Grand Rapids, Michigan, provides for a union shop except that objectors on religious grounds must pay a monthly fee in the same amount as the dues into the local union welfare fund. See *American Seating Company*, 98 NLRB 800, 801 (1952).

II. Section 14(b) Of The National Labor Relations Act Does Not Authorize States To Prohibit Or Regulate Union Security Agreements Which Do Not Require Union Membership As A Condition of Employment.

A. Federal Preemption and §14(b)

Absent some special factor, the doctrines of federal preemption and primary jurisdiction would foreclose the states entirely from dealing with the subject of union security in industries affecting commerce. For it is established that when an activity is "arguably subject" to the federal labor law, the states "must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245. See also *Garner* v. *Teamsters Local 776*, 346 U.S. 485; *Weber* v. *Anheuser-Busch*, 348 U.S. 468. The arguable subjection of union security arrangements to sections 7 and 8 of the National Labor Relations Act needs no elaboration; the issue presented in the case at bar, *NLRB* v. *General Motors Corp.*, No. 404, provides an ample demonstration.

The special factor relied on by respondents in *Retail Clerks Local 1625* v. *Schermerhorn*, No. 368, in an effort to justify insulating from the preemption doctrine a state's prohibition of collective bargaining agreements requiring employees to pay service fees to their bargaining representative, is of course section 14(b) of the NLRA. Section 14(b) provides:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring *membership* in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." (Emphasis added.)

Professor Charles Black of Yale has remarked in another context that "[s]implicity is out of fashion" in legal reasoning, prefatory to his setting forth a scheme of reasoning which he conceded was "awkwardly simple."[10] We find ourselves similarly disadvantaged. "Membership in a labor organization" as used in the Act signifies "adhesion to union membership" and "participation in union activities." See *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 39-40; *cf. Webster's Third New International Dictionary* (1961) ("membership * * * the state or status of being a member"). In our view a union contract whose requirements can be met by employee payments of fees to a labor organization, whether it be called an "agency shop" arrangement or something else, is simply not an agreement requiring union "membership" within the meaning of section 14(b). Whatever may be its status as a matter of federal law, therefore, such an agreement is not subject to state regulation. As Justice Stone has said on behalf of this Court: "While for the purposes of judicial decision dictionary definitions often are not controlling, they are at least persuasive that meanings which they do not embrace are not common." *Aschenbrenner* v. *United States Fidelity & Guaranty Co.*, 292 U.S. 80, 85.

Highly practical considerations support our view that the states lack the power to legislate regarding union security agreements which do not go so far as to require union membership in the full sense of the word. For the inevitable tendency of state "right-to-work" laws, if not kept within the strict bounds of literal membership, is to expand to cover practices clearly valid under federal law, and often having nothing to do with union membership as

[10] Black, "The Lawfulness of the Segregation Decisions," 69 Yale L. J. 421 (1960).

such. Thus, South Carolina and Arkansas have applied their right-to-work laws to outlaw the exclusive hiring hall.[11] *Branham* v. *Miller Electric Co.*, 237 So. Car. 540, 118 S.E. 2d 167 (1961); *Kaiser* v. *Price-Fewell, Inc.*, 359 S.W. 2d 449 (Ark. Sup. Ct. June 4, 1962), *cert. den.* Jan. 7, 1963, No. 612.[12] Iowa has used its right-to-work statute to regulate the check-off. See [1956] *Iowa Atty. Gen. Op.* 188, Sept. 16, 1955, 1 CCH LRR-State Laws, Iowa ¶46, 565.45. And Louisiana and South Dakota have taken the ultimate, but in a perverse way completely logical, step of interpreting their right-to-work laws as prohibiting unions from being the exclusive bargaining representatives in units containing dissenting employees. *Piegts* v. *Meat Cutters Local 437*, 228 La. 131, 81 So. 2d 835 (1955); [1957-58] *So. Dak. Atty. Gen. Op.* 236, Sept. 3, 1958, 43 LRRM 73 (1959). If one should accept the notion that under section 14(b) the states may regulate "compulsory unionism" in any broader sense than some form of membership requirement, it would become extremely hard to say that as a realistic matter anything could be more compulsive than a union's exclusive bargaining power. The power to compel, in agreement with an employer, the payment of relatively small fees is as nothing compared to the power to fix, in agreement with an employer, an employee's wages, his working hours, and every single other negotiable term and condition of his industrial existence. Yet national labor policy has long recognized the necessity for the latter kind of union authority. See, *e.g.*, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33. To prevent an intolerable intrusion of state policy into the realm of federal policy, the bounds of a

[11] Nondiscriminatory exclusive hiring halls are of course lawful under federal law. *Teamsters Local 357* v. *NLRB*, 365 U.S. 667.

[12] Examination of the petition for certiorari and the record in this case indicates that the question of federal preemption was not properly raised in the state courts.

state's authority over "membership" requirements cannot be measured by resort to a standard so imprecise that it takes in everything which might conceivably be termed "compulsory unionism."

We have previously argued the NLRB was correct in holding in *General Motors* that a clause giving employees the option of joining a union or paying certain fees to it was permissible under the proviso to section 8(a)(3), which allows agreements requiring "membership" in a labor organization as a condition of employment. At first blush there may appear to be an inconsistency between that position and our position on the limited power of the states under section 14(b). But there is none. It can readily be shown that our interpretations of the two sections are logically consistent. More important, the legislative history behind section 8(a)(3) and section 14(b) confirms that our interpretations reflect the real congressional purpose in enacting each of those provisions. As we will show, our view of the two sections also best comports with the line of decisions by this Court which have shielded national labor policy against unauthorized encroachments by the states.

B. The Different Functions of the Same Terminology in §8(a)(3) and in §14(b)

Our interpretation of section 14(b) is met at the outset with a simple semantic argument. Its starting point is the use of the same terms, agreements requiring union "membership," in section 8(a)(3)'s first proviso and in section 14(b). Under the 8(a)(3) proviso Congress allowed agreements requiring "membership." The NLRB in *General Motors* interpreted this permission to include permission for an agreement requiring either membership or the payment of fees by employees as an alternative to membership. In section 14(b) Congress allowed the states to prohibit agreements requiring "membership." To be logically

consistent, so goes the argument, one must concede that Congress was allowing the states to prohibit the same type of agreement permissible under the section 8(a)(3) proviso, *viz.*, an agreement requiring either membership or the payment of fees as an alternative to membership. That argument overlooks the utterly different functions served by the same terms in the two sections of the statute.

In section 8(a)(3)'s first proviso Congress used the terminology of requiring "membership" to delimit the maximum form of union security *permissible* as a matter of federal law. The Labor Board has therefore correctly included less restrictive forms within the boundaries of what was permissible. As long as the choice of membership is available, the existence of alternative options becomes irrelevant as a matter of federal law. On the other hand, in section 14(b) the same language is used to delimit the maximum reach of *prohibitory* state legislation. Hence the states are not empowered to invalidate union security arrangements which do not go so far as to impose a membership requirement. And as long as employees not desiring to join a union are provided with a genuine, meaningful alternative, an agreement cannot be said to require membership. In short, while permission for the greater requirement implies permission for the lesser, the power to prohibit the greater does not imply the power to prohibit the lesser.

An illustration will make this plain. If a state government were to set a maximum *permissible* rural speed limit of 50 miles an hour, this would obviously include permission for a driver to go at the lesser speed of 35 miles an hour. But if a state were to delegate to a county the authority to *prohibit* rural speeds of 50 miles an hour, this would just as obviously *not* include the authority to prohibit a driver from going at the lesser rate of 35 miles. Similarly, under

section 8(a)(3) federal permission for a membership requirement includes permission for anything less restrictive; but under section 14(b) state prohibitions of a membership requirement may not include prohibitions of anything less restrictive.

We are most emphatically not trying to say that requiring "membership" means one thing in section 8(a)(3)'s first proviso and something else in section 14(b). In each instance we regard the term as embracing the same elements, *viz.*, the regular fees obligations, plus other membership obligations, plus membership rights. This naturally means, as the Board held in *General Motors*, that the 8(a)(3) proviso allows the lesser requirement of fees alone, as an alternative option to the full membership requirement allowed by the statute. Under section 14(b) the states may forbid a requirement of membership, but that means, just as it does in 8(a)(3)'s first proviso, the elements of fees obligations, plus other membership obligations, plus membership rights. An agreement requiring only the single element of fees (or a portion thereof) is thus not an agreement requiring union membership which the states can prohibit. As in the illustration involving the two uses of the phrase "50 miles an hour," there is nothing at all inconsistent about using the same term "membership" in one part of the statute to mark the outermost boundary of permissible union-employer conduct, and in another part to mark the innermost boundary of allowable state regulation.

C. The Distinction Between "Membership" and "Fees Payments"

Another argument against our position consists in reading the two provisos to section 8(a)(3) together and concluding that for all practical purposes the *only* kind of agreement allowed under federal law is an agency shop

type requiring the payment of fees and dues. This argument in effect would equate the term "membership" as used in the Act with the payment of fees and dues. If this equation holds under section 8(a)(3), it should hold under section 14(b). Accordingly, the states must have the power to prohibit the requirement of fees payments, since that is all "membership" as used in the statute really means. And otherwise, it is concluded, the states' prohibitory power under section 14(b) would have little meaning. This argument fails because its premise is erroneous. Neither the legislative history nor a fair reading of the statute supports the notion that Congress was using "membership" as shorthand for the "obligation to pay fees and dues."

Legislative history indicates that the majority of Congress in amending section 8(a)(3) had two primary thoughts in mind: (1) a person should not be denied a job because he was not a union member, or removed from a job because he was unfairly ousted from union membership; and (2) a person should not be allowed to be a "free rider" and gain the benefits of unionism without paying for them. See generally S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., pp. 6-7 (1947); H. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess., pp. 33-34 (1947).

Congress accomplished its purposes in two separate provisos to section 8(a)(3). The first proviso prescribed the standards for the type of contract that a majority union and an employer could write—and that included requiring union "membership" after thirty days. The second prescribed limits on the way such a contract could be enforced *so far as job rights were concerned*—and that excluded arbitrary discrimination as long as fees and dues were tendered. There is no suggestion, however, that the two provisos had the same scope, or that "membership" meant only tendering

fees and dues. See S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 7 (1947) ("employers would still be permitted to enter into agreements requiring all the employees in a given bargaining unit *to become members* 30 days after being hired"); 93 Daily Cong. Rec. 3951 (April 23, 1947), 2 Leg. Hist. 1009 (Sen. Taft, explaining his bill's union shop provision: "after 30 days such employee *has to join the union*"). (Emphasis added.)

Proof that the first proviso's permission for agreements requiring "membership" meant membership in the usual sense of the term, and that accordingly the word should be given the same meaning in section 14(b), is also provided by the Senate and House debates on proposed amendments to prohibit even the union shop. Senator Ball, who offered such an amendment in the Senate, argued that there should be outlawed "contracts which make *membership* in a union a condition of employment." 93 Daily Cong. Rec. 5087 (May 9, 1947), 2 Leg. Hist. 1419. (Emphasis added.) To which Senator Taft replied, not that the allowable contract could require only fees payments, but that "since there had been for such a long time so many union shops in the United States, since in many trades it was entirely customary and had worked satisfactorily, I at least was not willing to go to the extent of abolishing the possibility of a union-shop contract. * * * In the bill we say that the employee *must join the union* within 30 days after he is employed." 93 Daily Cong. Rec. 5087 (May 9, 1947), 2 Leg. Hist. 1420. (Emphasis added.) See also 93 Daily Cong. Rec. 5089 (May 9, 1947), 2 Leg. Hist. 1422-23 (Sens. Thye, Flanders, Hawkes). Similar expressions are found in the House debate on the proposal to outlaw the union shop. See 93 Daily Cong. Rec. 3612-14, 3616, 3619 (April 16, 1947), 1 Leg. Hist. 733-34, 736, 739, 745 (Reps. Hoffman, Fisher, Buck, Smith of Ohio, Jonkman).

It is true that the NLRB has held that a union shop contract cannot be enforced by *discharging* an employee who is ready to tender his fees and dues, even though he refuses to assume any other obligations of union membership. *Union Starch and Refining Co.*, 87 NLRB 779 (1949), *enforced* 186 F.2d 1008 (7th Cir. 1951), *cert. den.* 342 U.S. 815; *Marlin Rockwell Corp.*, 114 NLRB 553 (1955). It is also true that Justice Reed has said in speaking for this Court: "This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 41. With due deference, we suggest that the latter statement was far broader than the cases at hand warranted.[13] Both it and the NLRB decisions may have resulted from concentrating too much on the special safeguards against the abuse of membership requirements and ignoring the authorization for the requirements themselves. The majority in Congress wanted open unions, not open shops.

In any event, however, none of this nullifies the distinction between membership and the mere payment of fees. None of it supports the conclusion that membership in sections 8(a)(3) and 14(b) means only fees payments, and that con-

[13] The *Radio Officers* decision dealt with three separate cases. One involved an employee whose seniority was reduced because he was late in paying union dues; there was no valid union security clause in existence. In the second case a union refused to let a company hire a member who had failed to seek union "clearance" before accepting a job offer; no union security arrangement applied. The third case involved disparate wage treatment for union members and nonmembers in the same bargaining unit; no union security agreement was at issue. In each of these cases the real question was whether there was "discrimination * * * to encourage * * * membership" within the general prohibition of sec. 8(a)(3), not whether there was unauthorized "utilization" of a valid union security clause.

sequently the states must have the power to prohibit a fee requirement. For regardless of the extent to which a union shop may be enforced, no one suggests that an otherwise valid contract becomes unlawful under section 8(a)(3) because by its terms it requires "membership" in a labor organization. And the plain fact is that a union shop contract so worded as to require membership has the practical effect of enlisting nearly all new employees into full-fledged union membership. As one commentator has remarked, "True, such 'literal' membership is unenforceable, but the psychological weight of the words themselves is significant." [14] This is highly desirable for a union simply as a means of promoting employee participation and loyalty.[15]

A contract requiring membership in terms also may have, at least indirectly, significant legal consequences. Once enrolled as a member, an employee becomes subject to the union constitution, which state courts have held is a legally binding contract between union and member. State courts, for instance, have enforced the collection of fines that have been imposed on a member for just cause. See, *e.g.*, *Auto Workers Local 756* v. *Woychik*, 5 Wis. 2d 528, 93 N.W.2d 336 (1958).

The first proviso to section 8(a)(3) thus gives unions a broader legal right than the second proviso allows them to enforce by way of job sanctions. The first proviso is phrased in terms of "membership" and encompasses not only the obligation of paying fees and dues but all the other privileges and responsibilities customarily associated with the

[14] Graves, "The Agency Shop vs. The 'Right to Work'," 40 Tex. L. Rev. 542, 552 (1962).

[15] *Cf.* Jones, "The Agency Shop," 10 Lab. L.J. 781, 789 (1959) ("The agency shop weakens the union movement and the union position in dealing with the employer because a greater number of employees do not take part in the running of union affairs and activities").

concept of membership. The second proviso, as now interpreted, is restricted to the obligation of paying fees and dues. When Congress used the term "membership" in section 14(b) in exempting certain state laws from the reach of the preemption doctrine, it was upholding for the states the very considerable power to prohibit agreements which go the full limit allowed by the first proviso to section 8(a)(3) and impose the requirement of union membership. But an agreement which does not go so far as to require membership in its commonly accepted sense is not brought within the ambit of state power. Anyone who suggests that this conclusion leaves the states with a meaningless power, on the ground that fees and dues are the sole significant element of union membership, is simply lacking in knowledge of trade union traditions and the needs of a fully healthy and responsible labor organization.[16]

Our discussion thus disposes of the argument that section 14(b) confers on the states no substantial power unless it is construed to include the power to outlaw the agency shop. But even though a state could only prohibit what is already prohibited under section 8(a)(3), this would still leave it with the highly meaningful power of concurrent jurisdiction if, as we will later suggest is likely,[17] the states have the authority to enforce whatever legislation section 14(b) empowers them to enact.

D. The Limited Scope of "Membership" in §14(b)

Perhaps the most substantial argument which has been fashioned in an effort to avoid a natural reading of section 14(b) goes off in a much different direction from the one just discussed. Instead of saying that "membership" as used in the Act means essentially just "fees and dues obliga-

[16] See note 15 *supra*.

[17] See part II-E, *infra*, pp. 33-35.

tions," it says that Congress used "membership" in section 14(b) to stand for every kind of employment condition that might be imposed for the benefit of a union. This contention relies on such statements as Senator Taft's explanation that section 14(b) was added to ensure that the states were left the power to prohibit "all forms of compulsory unionism," 93 Daily Cong. Rec. 6602 (June 5, 1947), 2 Leg. Hist. 1543, and the explanation by the House managers that the section was intended to keep the Act from depriving the states of their power to prohibit a "closed shop, union shop, maintenance of membership, or other form of compulsory unionism." H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., p. 60 (1947). The legislative history supplies several answers to this contention.

First of all, whenever the phrase "compulsory unionism" is used with any specificity in the reports or debates, it is always used in association with terms connoting a requirement of union membership in the usual and customary meaning of the word. This is true of the reference in the House report just quoted, which gave as examples of compulsory unionism three types of union security arrangements, all of which traditionally imposed the obligation of membership in the strict sense. It is also true of the statement by Senator Taft. Just prior to using the phrase "all forms of compulsory unionism," the Senator had described the effect of section 14(b) as making it clear that "nothing in the act is to be construed as authorizing compulsory union *membership* agreements" in states where such agreements were outlawed. 93 Daily Cong. Rec. 6602 (June 5, 1947), 2 Leg. Hist. 1543. (Emphasis added.)[18]

[18] Similarly, the original House report describes sec. 13 of the House bill, the predecessor of sec. 14(b) of the Act, as providing that state laws "that restrict the right of employers to require employees to become or remain *members* of labor organizations are valid." H. Rep. No. 245 on H. R. 3020, 80th Cong. 1st Sess.,

There is a more fundamental reason why general references to compulsory unionism should not be used to expand the term "membership" in section 14(b) beyond its normal scope. Indeed, we suggest that the essential key to understanding both the provisos to section 8(a)(3) and section 14(b) itself lies in appreciating one salient fact. In amending the National Labor Relations Act to combat what were regarded as the excesses of compulsory unionism, the majority of Congress was not concerned about the payment of nondiscriminatory fees to labor organizations; it was concerned about the "abuses of compulsory *membership*." S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 6 (1947). (Emphasis added.) Those abuses were seen as the requirement of "preexisting union membership as a condition of obtaining employment" and the use of "closed-shop devices as a method of depriving employees of their jobs" when they had been subjected to union discipline "for purely capricious reasons" *Ibid.* See also the specific incidents cited in 93 Daily Cong. Rec. 5087-88 (May 9, 1947), 2 Leg. Hist. 1419-20 (Sens. Ball, Taft); 93 Daily Cong. Rec. 4258 (April 28, 1947), 2 Leg. Hist. 1061-62 (Sen. Ellender); 93 Daily Cong. Rec. 5291 (May 13, 1947), 2 Leg. Hist. 1508

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p. 44 (1947). (Emphasis added.) On the limited scope of the terminology of sec. 14(b), see also 93 Daily Cong. Rec. A 3233 (June 21, 1947), 2 Leg. Hist 1627 (Sen. Taft: "State laws prohibiting union shops are to remain in effect"); 93 Daily Cong. Rec. 6614 (June 5, 1947), 2 Leg. Hist. 1561 (Sen. Morse: "this amendment proposes that we except from the national labor policy • • • national jurisdiction over these matters as they involve the closed shops and union shops"); 93 Daily Cong. Rec. 3563, 3617-18, 3620 (April 15-16, 1947), 1 Leg. Hist. 666, 743, 748 (Reps. Holifield, Case of South Dakota, and Hoffman). In short, as one writer has said regarding the use of the term "compulsory unionism" in the Taft-Hartley debates: "Particularly in the setting of the times, the phrase suggests enforced union membership in the full, formal sense." Graves, *supra* note 14, 40 Tex. L. Rev. at 547.

(Sen. Kem). Some members of Congress also expressed a certain "moral" concern about requiring any man to belong to an organization with which he did not wish to associate. See, *e.g.*, 93 Daily Cong. Rec. 5088-89 (May 9, 1947), 2 Leg. Hist. 1422-23 (Sens. Donnell, Hawkes); 93 Daily Cong. Rec. 3612, 3618-19 (April 16, 1947), 1 Leg. Hist. 733, 745 (Reps. Hoffman, Jonkman).

Legislative history thus establishes that the aim of the great majority in amending section 8(a)(3) was directed at compulsory membership as such, and not at the mere obligation to pay nondiscriminatory, nonexcessive fees.[19] Furthermore, when it comes to the legislative history of section 14(b) itself, we feel we can make the flat assertion that there is no intimation whatsoever that fee payments by themselves were any part of the compulsory unionism which the states were given the authority to regulate or prohibit. This is especially significant because Senator Taft had expressly referred on the floor of the Senate to the agency shop as it had developed in Canada,[20] see 93 Daily Cong. Rec. 5088 (May 9, 1947), 2 Leg. Hist. 1422, and the Senate and House committees were both aware that there could be arrangements whereby the obligation

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[19] Elsewhere in the Act Congress dealt specifically with the matter of payments to labor unions or their agents. See, *e.g.*, sec 8(b)(5) (charging employees excessive or discriminatory initiation fees) and sec. 302 of the Taft-Hartley Act, 61 Stat. 157 (1947), as amended by 73 Stat. 537, §505 (1959), 29 U.S.C. §186 (unauthorized employer payments to unions or employee representatives). This also indicates that if Congress had wished to allow the states to have authority under sec. 14(b) to deal with fee requirements as distinguished from membership requirements, it would have said so.

[20] See the arbitration decision by Justice Rand of the Supreme Court of Canada in *Ford Motor Company of Canada*, 1 Lab. Arb. Rep. 439 (1946).

to pay fees was separated from the obligation to join a union.[21]

Our insistence on a literal reading of "membership" in section 14(b) thus goes to the very heart of the congressional purpose. And that purpose was to curb the alleged evils of enforced membership by regulating the requirement of union membership as a matter of federal law, and by leaving the question of outright prohibition of the requirement of membership to the states. Fees divorced from membership were not regarded as the vice of compulsory unionism, and regulation of fees divorced from regulation of membership was not regarded as the cure. It follows that when Congress in section 14(b) left the power of further regulation of the requirement of membership in the hands of the states, it was not giving the power to regulate fees apart from membership.

Our analysis of the scope of section 14(b) is confirmed by several commentators. One of them writes:

> "A reading of the legislative history of this section of the Act indicates that Congress was influenced by arguments which struck at the morality of compelling membership in any organization as a condition of employment, but it should be noted that there is no suggestion in the debates or the records that the term *membership*, not qualified by a proviso as it was in §8(a)(3), was intended to have any meaning different from literal union membership."[22]

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[21] *See Hearings on S. 55 before the Senate Committee on Labor and Public Welfare*, 80th Cong., 1st Sess. pp. 66-67, 806 (1947); *Hearing on Bills to Amend the NLRA before the House Committee on Education and Labor*, 80th Cong., 1st Sess., pp. 1158-66 (1947).

[22] Note, "The Agency Shop and State Right-to-Work Laws," 35 Notre Dame Lawyer 547, 549 (1960). (Emphasis in the original.) See also Jones, *supra* note 15, 10 Lab. L.J. at 790 ("the agency shop is a lawful arrangement in any state if the intent of Congress when the Taft-Hartley amendment was passed in 1947 is con-

Nor is there any merit to the suggestion that "membership" in section 14(b) must be given an extended meaning because when Taft-Hartley was written, four or five of the states had enacted right-to-work laws which expressly included prohibitions on the payment of fees to labor organizations. These particular statutes were passed in early 1947, while the congressional hearings and debates were in progress. Not one had yet received a definitive interpretation in the state courts. Nowhere in the congressional reports or debates is there the slightest mention of the individual provisions of these state laws. Instead, as we have already said, whenever there is any specific mention of the types of agreements left subject to state control, the authorization is always phrased in terms of laws dealing with the "closed shop, union shop, or maintenance of membership," all of which require actual membership in the strict sense.

The subsequent application of the various right-to-work laws conclusively negates any sweeping congressional endorsement of their provisions. For example, as previously discussed,[23] the statutes of Arkansas and South Carolina have been applied to prohibit the exclusive hiring hall. While the Arkansas decision might be said to be a judicial construction of somewhat ambiguous statutory language, the South Carolina decision was based in part on an express provision forbidding any "agreement or combination • • • whereby any such union or organization acquires

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sidered"); Note, "The Agency Shop," 14 Fla. L. Rev. 281, 289-90 (1961) ("Any state that places greater restrictions on union security agreements than the prohibition of membership as a condition of employment has exceeded the authority granted to it under section 14(b)"). *Cf.* Graves, *supra* note 14, at 546 ("The chief reason assigned by the Senate report for the restrictions of section 8(a) (3) was union abuse of the closed shop privilege").

[23] See part II-A, *supra*, pp. 16-17.

an *employment monopoly* in any enterprise." So. Car. Code Ann. §40-46.1. (Supp. 1960). (Emphasis added.)[24] To impute to Congress the intent to allow state prohibition of fees payments could therefore logically mean imputing the intent to allow state prohibition of an "employment monopoly" like an exclusive hiring hall. We do not think that that will be this Court's ultimate disposition of the highly significant hiring hall issue, any more than it has been this Court's disposition of other state encroachments on federal labor policy in the name of right-to-work. *Cf. IBEW Local 429* v. *Farnsworth & Chambers Co.*, 353 U.S. 969; *DeVries* v. *Baumgartner's Electric Construction Co.*, 359 U.S. 498; *Laborers Local 438* v. *Curry*, No. 87, this Term, decided January 21, 1963.

In dealing with congressional purpose, we should not lose sight of the obvious. To embody the legislative intent regarding the allowable scope of state jurisdiction, the terminology chosen for section 14(b) was agreements "requiring membership"—and nothing else. As this Court has said: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Associations*, 310 U.S. 534, 543.

E. Judicial Treatment of §14(b) As An Exception to Preemption

The Florida courts in *Schermerhorn*, like the Kansas Supreme Court in *Higgins* v. *Cardinal Manufacturing Co.*, 188 Kan. 11, 360 P.2d 456 (1961), *cert. den.* 368 U.S. 829,

[24] The South Carolina statute was not passed until 1954. The provision covering an "employment monopoly," however, is identical to a provision in the North Carolina statute, No. Car. Laws 1947, c. 328, No. Car. Gen. Stat. Ann. §95-79 (1958), in effect when Taft-Hartley was enacted.

misplaced their reliance in citing this Court's decision in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301, as broadly sustaining the power of the states under section 14(b) to regulate all kinds of union security agreements (R. 27-28). *Algoma* did nothing of the sort. *Algoma* upheld the power of a state labor agency to order reinstatement of an employee discharged under a maintenance of *membership* agreement which was executed in violation of a state law requiring a two-thirds employee vote approving such a clause. The situation therefore fell precisely within the terms of section 14(b)'s authorization for state laws dealing with the "execution or application" of contracts "requiring membership in a labor organization as a condition of employment." With the holding in *Algoma* we need not have the slightest quarrel.

Even so, *Algoma* has only a limited usefulness in treating the 14(b) issue because it was primarily concerned with an issue arising under the original Wagner Act. Not until after Taft-Hartley's comprehensive regulation of union as well as management activities did there begin the full development of the doctrine of federal preemption in the labor relations field. *Algoma* preceded *Garner* v. *Teamsters Local 776*, 346 U.S. 485, by over four and a half years, and *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, by over ten. And in the meantime came two highly significant per curiam reversals of state court assumptions of jurisdiction to enforce state labor relations or right-to-work laws as they affected activities involving union security arrangements. See *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953, *rvsg.* 255 Wis. 285, 38 N.W. 2d 688 (1949); *IBEW Local 429* v. *Farnsworth & Chambers Co.*, 353 U.S. 969, *rvsg.* 201 Tenn. 329, 299 S.W. 2d 8 (1957). See also the post-*Garmon* per curiam reversal in *DeVries* v. *Baumgartner's Electric*

Construction Co., 359 U.S. 498, *rvsg.* 77 So. Dak. 273, 91 N.W. 2d 663 (1958), and the decision of this Court in *Laborers Local 438* v. *Curry*, No. 87, this Term, decided January 21, 1963.

It has been suggested, on the basis of the last-cited per curiam decisions, that section 14(b) merely authorizes the states to declare agreements requiring membership unlawful, but that the states are preempted of the jurisdiction to enforce their laws, with the sole remedy being through an unfair labor practice proceeding before the NLRB. See, *e.g.*, *Building Construction Trades Council* v. *American Builders*, 139 Colo. 236, 337 P.2d 953 (1959). *Algoma* in effect would be regarded as overruled. This view of section 14(b) as simply empowering the states to cancel the protection afforded by the proviso to section 8(a)(3) is a possible one, and of course without more would call for reversal in *Schermerhorn*.

Such an interpretation of section 14(b) and of the reversals from *Plankinton* through *Curry*, however, may not be the most persuasive. The notion of a valid state law not enforceable by the state but only enforceable by a federal tribunal causes certain jurisprudential misgivings. Moreover, we do not know whether it can be shown that such a concept squares with the congressional design,[25] or that this

[25] The House bill, as reported and passed, contained in its counterpart to the present 8(a)(3) provisos authorizing the union shop an authorization for union membership requirements "if such provisions are not in conflict with the law of any State in which the agreement is to be carried out." H. R. 3020, 80th Cong., 1st Sess., "§8(d)(4)." The bill also contained a provision, however, that "such agreements shall, in addition to being subject to any applicable preventive provisions of this Act, be subject to the operation and effect of such State laws and constitutional provisions as well." *Id.*, "§ 13." Sec. 8(a)(3) of the Act is based on the Senate bill, which contained no language conditioning the validity of union security agreements on the absence of contrary state law. See H.R. 3020, as passed Senate, 80th Cong., 1st Sess., "§8(a)(3)."

Court has declared the demise of *Algoma* even to the extent of its precise holding. But we do wholeheartedly agree with the view that *Plankinton* and the several later reversals have sharply limited any broad reading of either *Algoma* or section 14(b)'s grant of authority to the states.

Plankinton and the other cases did not involve just the "execution or application" of an agreement requiring membership. In each instance there was other conduct, typically picketing to secure some arrangement but in *Plankinton* work stoppages and various forms of harassment to enforce one, which could not be characterized simply as the "execution or application" of a contract. This narrow reading of section 14(b), and this elimination of any expansive potentiality in *Algoma*, is wholly in accord with the preemption doctrine as refined in the decisions from *Garner* through *Garmon*. And "if the danger of state interference with national policy is to be averted," *Garmon*, 359 U.S. at 245, it is no more necessary to circumscribe the type of conduct over which the states can exercise jurisdiction than it is to circumscribe the type of agreement over which they can exercise jurisdiction. In the one case it is conduct which can be described strictly as the "execution or application" of an agreement; in the other it is an agreement which can be described strictly as one requiring "membership."

Assuming *Algoma* is still good law in holding that the states have the power to enforce whatever legislation, however limited, they are permitted by section 14(b) to enact, this dispels one final objection made by those who would read the section as conferring on the states the power to outlaw fee requirements. For even if the practical effect of section 8(a)(3) and its provisos were the prohibition of all true membership requirements, and even if the states could thus do no more than prohibit the same type of agreement already prohibited by section 8(a)(3), this would not

make the grant of authority in section 14(b) an empty gesture. The power of concurrent jurisdiction over agreements requiring membership, and the power to impose added penalties, including criminal penalties, for violations of state law, would remain powers of the most considerable magnitude. This would also be completely in accord with an express statement made by Senator Taft in explaining the conference agreement:

> "In other words, the whole spirit of the Wagner Act and its provisions would prohibit a *closed shop*, because it prohibits discrimination against people who are not *members* of labor unions. In order to preserve that right and to keep the Wagner Act itself from abolishing the *closed shop* everywhere, it was necessary to write in this proviso. But that did not in any way prohibit the *enforcement* of state laws which *already* prohibited *closed shops*.
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> "That has been the law ever since that time. It was the law of the Senate bill; and in putting in this express provision [section 14(b)] from the House bill, we in no way change the bill as passed by the Senate of the United States." 93 Daily Cong. Rec. 6679 (June 6, 1947), 2 Leg. Hist. 1597. (Emphasis added.)

Section 14(b) of the Act was based on, and was intended to have the "same effect" as, section 13 of the House bill. See H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., p. 60 (1947) As reported and passed, section 13 similarly provided only that agreements requiring union "membership" should be left subject to the "operation and effect" of state laws. H.R. 3020, 80th Cong., 1st Sess., "§ 13" (1947). In explaining this proposed section, the House committee was expressly cognizant that "by the Labor Act Congress preempts the field that the act covers" and that "the courts have not finally ruled upon the effect • • • of State laws dealing with compulsory unionism." H. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 44

(1947). Yet no attempt was made to do more than see that state laws "that restrict the right of employers to require employees to become or remain *members* of labor organizations are valid." *Ibid.* (Emphasis added.)

Whether one looks to the floor debates, or the legislative purpose, or the committee reports, or the statutory language, or the subsequent trend of judicial decisions, only one conclusion is supportable: Congress in 1947 was leaving to the states the power to regulate the "execution or application" of agreements requiring union "membership" in the usual and customary meaning of the word—and that is all. Collective contracts requiring fees payments to a labor organization, though without doubt "arguably subject" to the jurisdiction of the NLRB, are not agreements requiring "membership" in a labor union. They are thus not subject to regulation or prohibition by any state.

III. An Agreement Like That In *Schermerhorn*, Requiring Employees To Pay A Service Fee Representing A Proration Of Collective Bargaining Costs, Is Not Subject To State Prohibition Under Section 14(b).

A. The Ruling at Issue in *SCHERMERHORN*

As we have demonstrated above, the legislative history and the purpose of section 14(b) call for a construction consistent with its plain meaning: union contracts requiring membership in a labor organization may be prohibited by a state, while those which do not require membership may not. Accordingly, even though they may constitute a form of "union security," contracts requiring of workers periodic payment obligations without requiring membership in the union, should not be construed within the state's prohibitory authority under section 14(b).

Nevertheless, we recognize that the "agency shop"

formula presented in the *General Motors* case remains arguably subject to state prohibition, on the theory that it does *in fact* require membership. It might be urged that under the General Motors-Meade[26] formula, since the periodic payments are but an equivalent substitute for union dues and are used for union benefits denied to nonmembers, the payment for unobtained benefits encourages membership and is tantamount to the compulsion of membership. The discussion presented in the previous section disposes, in our view, of this broader reading of section 14(b). But no occasion now arises for resolution of the question concerning the status of the agency shop in a "right-to-work" jurisdiction. Whatever might be the status under section 14(b) of a traditional agency shop contract requiring nonmembers to pay a union dues equivalent under another name, the *Schermerhorn* case does not involve the agency shop but the "service fee shop." The *Schermerhorn* contract calls for payment of a service fee *"for the purpose of aiding the Union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees"* (R. 9). (Emphasis added.) The contract requires a nonmember to pay only for the collective bargaining he actually obtains from the union. As we demonstrate herein, such a service fee obligation cannot be deemed "requiring membership in a labor organization" within the meaning of section 14(b).[27]

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[26] See *Meade Electric Co.* v. *Hagberg*, 129 Ind. App. 631, 159 N. E. 2d 408 (1959) (upholding under Indiana's right-to-work law a contract requiring employees either to join the union or to pay it an amount equivalent to dues and fees).

[27] It might be suggested, however, that if a service fee contract is not a form of union security subject to state prohibition under sec. 14(b), then it may also fail to survive under the provisos of sec. 8(a)(3) authorizing contracts requiring "membership." One answer, elaborated in part II-B, *supra*, is that the "requiring mem-

The ruling under review in *Schermerhorn* holds that Florida may prohibit the collection of any service fees from workers who elect not to join the union. The adjudication arises from a complaint by certain Food Fair employees asking the Florida court to declare invalid Section 2 of Article 19 of the contract between the union and the employer,[25] and to find that the union may not receive "*any* initial service fees or monthly service fees from plaintiffs * * * " (R. 6-7). (Emphasis added.) The Dade County

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bership" terminology of sec. 8(a)(3) and sec. 14(b) need not have and does not have the identical impact. Another answer is that a true service fee may well not need the saving provisos to sec. 8(a)(3), because it is not subject to the prohibitions of sec. 8(a)(3) *itself*. That section, which prohibits "discrimination" in the terms of employment "*to encourage*" membership, seems clearly inapplicable to a service fee requirement. A service fee cannot be viewed as constituting a discrimination "to encourage" membership in the union, but constitutes a legitimate proration of the costs of collective bargaining conducted by the union for all workers pursuant to the exclusive bargaining obligation of the federal Act. In any event, this question of federal law is not presented for the Court's present adjudication, which is limited to the issue regarding the ambit of Florida's prohibitory power under sec. 14(b).

[25] The relevant portion of Art. 19, Sec. 2 of the agreement (R. 3-4, 9) provides:

> "Employees shall have the right to voluntarily join or refrain from joining the Union. Employees who choose not to join the Union, however, and who are covered by the terms of this contract, shall be required to pay as a condition of employment, an initial service fee and monthly service fees to the Union for the purpose of aiding the Union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit. The aforesaid fees shall be payable on or before the first day of each month, and such sums shall in no case exceed the initiation fees and the membership dues paid by those who voluntarily choose to join the Union. Other than the payment of these service fees, those employees who do not choose to join the Union shall be under no further financial obligations or requirements of any kind to the Union."

Circuit Court dismissed the complaint *"for the reason that the Court finds that the agency shop clause, Section 2, Article 19 of the contract between the defendant Union and the defendant Food Fair is not violative of the Florida 'right-to-work law' * * * "* (R. 15). (Emphasis added.) This ruling was reversed by the Supreme Court of Florida, which held that Florida's right-to-work law prohibits a contractual requirement for the payment of any service fee. To the argument that the service fee does not require membership in the union but only a proration for collective bargaining services received by all workers, the Supreme Court of Florida replied that such a fee is a form of "association with a labor union," which the Constitution of Florida leaves a matter for "individual determination and preference" (R. 23):

> "The appellees contend that, except for the 'agency-shop' provision, the non-union employees of the appellant Food Fair would be 'free riders,' that is, they would reap the benefits of union representation without having to bear any of the cost thereof. This argument is grounded on the fact that the union is, by law, the bargaining agent for all employees—those who do not belong to the union as well as those who do. 29 U.S.C.A. §159. This argument may be answered by reference to the section of the [Florida] Constitution under consideration. Clearly, it is the intent of this section to leave as a matter for *individual determination and preference* the question of whether the worker will derive any benefit from association with a labor union. The choice is his to make."[29] (Emphasis in the original.)

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[29] The *Schermerhorn* contract does not itself set the amount of the service fee, although it does provide that in no case shall it exceed membership dues. A subsequent verbal understanding between the union and the employer was to the effect that the service fee would be equal to the union dues. However, the complaint does not attack the amount of the fee to be collected, but the power of the union to collect *any* service fee representing a proration of

B. No Congressional Purpose or Legislative History Supports State Authority to Prohibit A Prorated Service Fee For Collective Bargaining Costs.

Florida desires to treat a service fee for collective bargaining as a prohibited form of "association" with a labor union. But the ambit of Florida's prohibitory power is defined by section 14(b) of the national Act; and there is no apparent congressional purpose served nor legislative history to support so attenuated a construction of that section. In the subsequent discussion we review legislative history showing congressional desire to preclude "free riders," through the spreading of bargaining costs to all the employees. But for the present discussion, the significant fact is that nowhere in the entire legislative history was any suggestion made that states should be permitted to prohibit a prorated service fee for the collective bargaining which the union must conduct for all the workers.

Nor is any apparent congressional purpose served by importing into section 14(b) state authority to prohibit service fees. The extended legislative discussion of union security and compulsory unionism in connection with enactment of section 14(b) is wholly inapposite to the question of the collective bargaining service fee. No conscientious scruples of dissenters and nonjoiners are transgressed by the service fee shop, which neither compels nor even encourages union membership. Unlike agency shop formulas

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collective bargaining costs. The Florida courts' rulings are upon *that* question. The Florida lower court's dismissal of the complaint was based on the court's finding—"that the agency shop clause, Section 2, Article 19 of the contract between the defendant Union and defendant Food Fair is not violative of the Florida 'right to work law' "; and the Florida Supreme Court's reversal is limited to that ruling. Thus, all that is presently before this Court is the question whether Florida may prohibit the making of a contract calling for service fees "for the purpose of aiding the union in defraying" collective bargaining costs.

which may require payment by nonmembers for union benefits they do not receive, the service fee shop compels no one to pay for more than the collective bargaining benefits he does receive. Under these circumstances, it could be said that the service fee is not even a form of "union security," as commonly understood. At least it is clear that the service fee shop is wholly free of the "minority rights" objections honored by the Congress when in section 14(b) it delimited an area of state right-to-work authority.

Since no legislative history, no apparent congressional purpose, nor the text of section 14(b) itself support state authority to prohibit the service fee contract, the Florida Supreme Court's ruling in *Schermerhorn* must plainly fall for lack of any statutory support. But here there is even more—there is a clearly recognized congressional and public policy against state authority to prohibit the service fee.

C. State Authority to Prohibit the "Service Fee Shop" Is Contrary to Congressionally Recognized Public Policy.

Importing into section 14(b) state authority to prohibit the service fee shop would require the presumption of congressional idiosyncrasy. For Congress has long required through section 9(a) of the Act that the certified collective bargaining representative is the exclusive bargaining representative for all the employees in the bargaining unit, irrespective of their union membership or nonmembership. See, *e.g.*, *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 255-56; *St. Louis Public Service Co.*, 77 NLRB 749 (1948); *Pittsburgh Plate Glass Co.*, 111 NLRB 1210 (1955). Only the clearest legislative language should lead to the conclusion that Congress authorized states to prohibit proration among all in the bargaining unit of the costs of the collec-

tive bargaining which Congress has required the union to undertake for the benefit of all."

Far from a congressional intent to bar fair taxation for compulsory representation, the chief sponsor of the 1947 Act expressly stated that the legislation was intended to *preclude* free riders, and to promote the spreading of the collective bargaining burden to all its beneficiaries. Senator Taft stated in the congressional debates that while there is no constitutional way to impose a direct tax "for union support, if the union is a recognized bargaining agent for all the men," Congress could yet validate contractual requirements for the payment of the costs of bargaining. See 93 Daily Cong. Rec. 5088 (May 9, 1947), 2 Leg. Hist. 1422. He emphasized that the legislation would preclude a situation—*the very situation created in Florida by the* Schermerhorn *ruling*—where those "not in the union will get a free ride" on the benefits obtained by the union's efforts:

> "I may say that the argument made for the union shop, and against abolishing the closed shop, is that if there is not a closed shop those not in the union will get a free ride, that the union does the work, gets the wages raised, then the man who does not pay dues rides along freely without any expense to himself. Under the Canadian rule, and under the rule of the committee, we pretty well take care of that argument. There is not much argument left." 93 Daily Cong. Rec. 5089 (May 9, 1947), 2 Leg. Hist. 1422.

Senator Taft clearly expressed the congressional intention to preclude free riders by validating *inter alia* contractual arrangements similar to those of the Canadian "Rand formula," which in the United States has taken the form of the agency shop and the service fee shop. It cannot be supposed that in the absence of any text or intimation to

that effect, the Act nevertheless left states free to revive the free rider situation Senator Taft had assured Congress was precluded by the Act.

Moreover, the federal policy reflected in the congressional mandate that the exclusive representative bargain for all, and in Senator Taft's assurance of congressional determination to preclude free riders, has been recognized by this Court. As long ago as *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, the Court gave substance to the congressional requirement under the Railway Labor Act of representation for all in the craft or class, holding it a duty which must be exercised equally and without discrimination against nonmembers. See also *Syres* v. *Oil Workers Local 23*, 350 U. S. 892 (decided under the National Labor Relations Act). More recently in *Machinists* v. *Street*, 367 U.S. 740, the Court recognized the particular congressional concern over the costs of collective bargaining which the union must conduct for all in the craft. This Court ruled that the Railway Labor Act's union security proviso has a differing impact when the union seeks on the one hand to retain the worker's contribution for collective bargaining costs and on the other for union political activities. But in the service fee shop the contract calls only for collection of a service fee to defray the costs of collective bargaining; the obligation of the worker who chooses not to join the union is thus no more than his fair share of the collective bargaining costs of which he has been the beneficiary.[30]

In this respect such a service fee would be like the rea-

[30] An extended discussion of the equity of requiring nonunion employees to pay a "bargaining fee" to their collective bargaining representative is provided by Professor John V. Spielmans of Marquette in Spielmans, "Bargaining Fee versus Union Shop," 10 Ind. & Lab. Rel. Rev. 609 (1957).

sonably apportioned fee required of nonunion registrants using a union's exclusive hiring hall or referral system, which the Labor Board found neither discriminatory nor otherwise violative of the Act in *H. John Homan Co.*, 137 NLRB No. 118, 50 LRRM 1310, 1962 CCH NLRB ¶ 11,392 (June 29, 1962). A union operating an exclusive hiring hall is required by law to operate it nondiscriminatorily, see *Teamsters Local 357* v. *NLRB*, 365 U.S. 667, just as a union serving as exclusive bargaining representative is required to represent all employees nondiscriminatorily. The bargaining representative should be equally entitled to a fairly apportioned service fee to help defray its expenses. We also suggest that if a union found it could not pay its share of the costs of a joint employer-union arbitration system, as the duly selected collective bargaining agent it should be able to agree with the employer that all employees in the unit, union members and nonmembers alike, would be required to pay a reasonably apportioned amount toward the maintenance of the arbitration machinery.[21] At any rate, the legality of such an arbitration fund fee, or of the hiring hall fee in *Homan* or of the service fee in *Schermerhorn* or of any similar fee, should be decided by

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[21] A majority of the Labor Board in *Hughes Tool Co.*, 104 NLRB 318 (1953), was prepared to revoke the certification of a union which set up a fee schedule ($15 for a grievance, $400 for an arbitration) for providing particular services for nonmembers. In *Hughes*, however, the Board did not have before it the question of fairly *apportioned* fees; the fee schedule there had the obvious effect of making union membership preferable to nonmembership for employees needing particular services. And *Hughes* at least was handling the whole problem within the proper framework, *viz.*, federal law. So far as *Schermerhorn* is concerned, it matters not whether the service fee is lawful or unlawful under federal law; in either case, as long as the fee cannot be equated with membership, Florida is preempted of jurisdiction. *Cf. Garmon*, 359 U.S. 236; *DeVries* v. *Baumgartner's Electric Construction Co.*, 359 U.S. 498.

the NLRB as a matter of uniform national law and policy, and not by the states as a matter of their own individual and differing laws and policies.

Florida has sought to prohibit the service fee shop in the face of the clear national policy in favor of equal apportionment of the bargaining benefits and costs among all the workers. And if requiring the sharing of the costs of collective bargaining is "requiring membership" within the meaning of section 14(b), then that section has been stripped of any rational guidelines. On the limitless rationale of the Florida Supreme Court the hiring hall or the hiring hall fee, exclusive recognition or the collective contract itself, may just as easily be said to compel a worker's unwanted "association" with the union.[22] Section 14(b) on this theory becomes an unlimitable exception to federal preemption. Instead of a reservation of state authority to bar compulsory membership in the union, section 14(b) is then an invitation to state control of substantive matters which Congress relegated to the exclusive jurisdiction of the National Labor Relations Board.

This Court cannot open so wide a door in the congressionally created national jurisdiction unless Congress has manifested a readiness for shared jurisdiction with the states. Here the congressional purpose is aptly defined by the statutory language: states may prohibit agreements "requiring membership." A service fee contract is another matter—and Florida's desire to go so far afield cannot be sustained.

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[22] *Cf. Teamsters Local 357* v. *NLRB*, 365 U.S. 667, 675-76 ("It may be that the very existence of the hiring hall encourages union membership. • • • The truth is that the union is a service agency that probably encourages membership whenever it does its job well").

CONCLUSION

For the foregoing reasons the judgments below in *General Motors*, No. 404, and *Schermerhorn*, No. 368, should be reversed.

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